

No. 6891

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY K. PERSONIUS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Transcript of the Record

Upon Appeal from the District Court of the United
States for the District of Idaho, Southern Division.

FILED

STRAWN & Co., INC., PRINTERS, BOISE, IDAHO

PAUL P. O'BRIEN,
CLERK

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United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY K. PERSONIUS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

JESS B. HAWLEY,

OSCAR W. WORTHWINE,

Boise, Idaho

Attorneys for Appellant

H. E. RAY,

U. S. District Attorney

RALPH R. BRESHEARS,

Assistant U. S. District Attorney

Boise, Idaho

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*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY K. PERSONIUS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 1676

COMPLAINT

Filed December 10, 1931

COMES NOW, The plaintiff in the above entitled action and complaining of the defendant alleges as follows, to-wit:

FIRST CAUSE OF ACTION

I.

That the plaintiff herein is now a resident and citizen of Boise, County of Ada, State of Idaho, in the Southern Division of the District of Idaho.

II.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on the 16th day of June, 1916, the plaintiff enlisted for military service in the United States Army and served as a member of said United States Army continuously until he was honorably discharged from said United States Army on the 27th day of February, 1920.

IV.

That while in the said United States Army, and during the period between his said enlistment, and his honorable discharge as aforesaid, this complainant, desiring to be insured against the risks of war, and on or about November, 1917, applied for a policy of war risk insurance in the sum of Five Thousand (\$5,000.00) Dollars, and at the time of said application authorized the deduction from his service pay of all premiums that might become due thereon, and thereafter there was deducted from his monthly pay certain sums of money as premiums for said insurance to and including the month of February, 1920.

V.

That a certificate of war risk insurance was duly issued by the terms whereof the defendant agreed to pay the plaintiff \$28.75 per month in the event that he suffered total and permanent disability, but that no policy of insurance was ever delivered to the plaintiff, and said certificate has been lost.

VI.

That while this plaintiff was in the military service of the United States as aforesaid and during the World War, and subsequent to the effective date of said insurance, and while said policy was in full force and effect, this plaintiff on October 31, 1918, while engaged in armed combat with the armed forces of the Central Powers, was wounded by being struck in the left leg by a fragment of high explosive shell, which caused a destruction of bone substance in the tibia and fibula, a contracture of the plantar tendon, a shortening of the left leg, an atrophy of the left leg, an infection of the left leg, and osteomyelitis of the bones of the left leg, and the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918, and this plaintiff is informed and believes, and upon information and belief alleges the fact to be that as a result of said injuries and diseases the said plaintiff became and was, on October 31, 1918, and during the time said insurance was in full force and effect, totally disabled, and that such total disability was founded

upon conditions which made it reasonably certain that it would continue throughout his life and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929. That by reason thereof he became entitled to receive from the defendant the sum of \$28.75 per month from October 31, 1918, to January 1, 1929.

VII.

That heretofore and upon the 4th day of February, 1931, this plaintiff demanded of the defendant in writing payment of the benefits of said war risk insurance, and on said date filed with the United States Veterans Bureau a written claim for said war risk insurance, but said defendant and said United States Veterans Bureau and the Director thereof have disputed and disallowed the claim of this plaintiff and have failed and refused and now fail and refuse to make payments thereunder, and that said claim was denied by defendant on the 5th day of December, 1931; that the period of time elapsing between the filing of said claim with the United States Veterans Bureau and the denial thereof was more than five months; that a disagreement exists between the plaintiff and defendant and that said disagreement has existed since the 5th day of December, 1931.

SECOND CAUSE OF ACTION

As a second cause of action plaintiff complains and alleges:

I.

As paragraph I plaintiff hereby incorporates the allegations contained in Paragraphs I, III, V, VI and VII of his first cause of action as fully and completely as if set out herein in full.

II.

That while in the said United States Army, and during the period between his said enlistment, and his honorable discharge as aforesaid, this complainant, desiring to be insured against the risks of war, and on or about February....., 1918, applied for a policy of war risk insurance in the sum of Five Thousand (\$5,000.00) Dollars, and at the time of said application authorized the deduction from his service pay of all premiums that might become due thereon, and thereafter there was deducted from his monthly pay certain sums of money as premiums for said insurance to and including the month of February, 1920.

WHEREFORE, This plaintiff demands judgment against the defendant upon his first cause of action in the sum of \$28.75 per month from the 31st day of October, 1918, until January 1, 1929, and upon his second cause of action in the sum of \$28.75 per month from October 31, 1918, until January 1, 1929, together with interest thereon, and his costs and disbursements herein incurred, and attorneys' fees; and that this court determine what is a reasonable fee to be allowed plaintiff's

attorneys, and direct the payment of said fee to plaintiff's attorneys.

HAWLEY & WORTHWINE,
Aesidence; Boise, Idaho,
Attorneys for Plaintiff.

(Duly verified)

(Title of Court and Cause.)

DEMURRER:

Filed February 4, 1932

COMES NOW the defendant in the above entitled cause and demurs to plaintiff's Complaint on file herein, generally and specially, upon the following grounds, to-wit:

I.

That the first cause of action of plaintiff's Complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling.

II.

That the second cause of action of plaintiff's complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said second cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said second cause of action were only temporarily disabling.

H. E. RAY,

United States Attorney for the
District of Idaho.

RALPH R. BRESHEARS,

Assistant U. S. Attorney for the
District of Idaho.

Attorneys for the defendant.

(Title of Court and Cause.)

DECLINATION TO PLEAD FURTHER.

Filed June 7, 1932

COMES NOW the plaintiff in the above-entitled cause and having been advised of the ruling of the above-entitled Court upon the Demurrer to his com-

plaint herein, hereby declines to plead further in the above-entitled cause.

Dated this 7th day of June,

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

(Service acknowledged)

(Title of Court and Cause.)

JUDGMENT OF DISMISSAL.

Filed June 7, 1932

The above-entitled cause came on for hearing by the above-entitled Court upon the complaint and the demurrer of the defendant to the complaint, and written briefs were submitted by the respective parties, and the Court having considered the same, did, upon the 26th day of May, 1932, render an opinion sustaining the demurrer of the defendant to the complaint on file herein, and the plaintiff herein having filed his declination to plead further in the above-entitled cause.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff and the action herein be and the same is hereby dismissed

at plaintiff's costs, and the plaintiff having excepted to the ruling of the Court upon said demurrer and having excepted to the dismissal of said cause, said exceptions are hereby allowed.

Dated this 7th day of June, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

Filed June 7, 1932

BE IT REMEMBERED that in this case the plaintiff herein filed his complaint in the above entitled Court on the 10th day of December, 1931, the said complaint consisting of two causes of action, same being upon separate policies of war risk insurance issued to the plaintiff.

That thereafter on the 4th day of February, 1932, the defendant herein filed its general demurrer to said complaint and each cause of action thereof.

And that thereafter the respective parties hereto submitted written briefs and that the Court duly considered said written briefs and did upon the 26th day of May,

1932, render the following opinion and decision upon said demurrer:

“The demurrer to the complaint is sustained.” to which said ruling the plaintiff duly took an exception, which exception was duly allowed by the Court.

Whereupon, and upon the 7th day of June, 1932, the the plaintiff herein filed in the above entitled Court his refusal to plead further.

Whereupon, and upon the 7th day of June, 1932, the Court made and entered in the above entitled cause an order dismissing said complaint, to which order of dismissal and ruling of the Court the plaintiff duly took an exception, which exception was duly allowed.

CERTIFICATE

It is hereby certified that the above and foregoing proceedings were had in this cause and that this Bill of Exceptions contains all of the papers relative to or necessary to the foregoing exceptions, and that it conforms to the truth and that it is in proper form.

It is further certified that this Bill is a true bill of exceptions and that the foregoing exceptions in each case asked for were taken by the plaintiff, were allowed by the Court and that this Bill of Exceptions was duly prepared and filed within the time fixed by the Court and order of this Court, and is by me duly allowed and signed as a Bill of Exceptions, and I further certify that the only papers or documents considered by me in rendering an opinion sustaining the demurrer of the

defendant and in entering the order of dismissal herein, were the following:

1. Complaint of the plaintiff.
2. Demurrer of the defendant.
3. Declination of the plaintiff to plead further.

That the above and foregoing Bill of Exceptions is by me duly allowed and signed this 7th day of June, 1932, as a Bill of Exceptions.

CHARLES C. CAVANAH,
District Judge.

(Service acknowledged)

(Title of Court and Cause.)

STIPULATION FOR SETTLEMENT.

IT IS HEREBY STIPULATED AND AGREED that the above and foregoing Bill of Exceptions, which has been examined by the attorneys of record for the parties to the above entitled action, may be settled and allowed as plaintiff's Bill of Exceptions in the above entitled cause and that the Court may sign the above and foregoing certificate.

Dated this 7th day of June, 1932.

HAWLEY & WORTHWINE,
Residence. Boise, Idaho,
Attorneys for Plaintiff.

H. E. RAY,

United States Attorney for
District of Idaho.

RALPH R. BRESHEARS,

Assistant U. S. Attorney.
Attorneys for Defendant.

(Title of Court and Cause.)

PETITION FOR APPEAL

Filed June 14, 1932

The above named plaintiff, Henry K. Personius, conceiving himself to be aggrieved by the orders and rulings made upon the demurrer in the above entitled cause and by the order and judgment of this Court dismissing the same, filed and entered on the 7th day of June, 1932, in the above entitled cause and proceeding, does hereby appeal from the said ruling on demurrer and the said judgment of dismissal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for the reason and upon the ground specified in the assignments of error filed herewith, and prays that his appeal may be allowed; that a citation issue as provided by law, and that a transcript of the records, proceedings and papers upon which said judgment was entered as aforesaid, duly authenticated, may

be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and this plaintiff prays for an order fixing the bond which the plaintiff shall give to secure to defendant the payment of costs if said plaintiff should fail to sustain his contention in said appeal.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

(Service acknowledged)

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR

Filed June 14, 1932

The above named plaintiff files this as his assignments of error and contends that the trial court erred in the following particulars in the above entitled cause:

I.

That the trial court erred in ruling and holding that the complaint in the above entitled cause did not state a cause of action.

II.

That the trial court erred in sustaining the demurrer to the complaint.

III.

That the trial court erred in entering a judgment of dismissal of the complaint and action herein.

IV.

That the trial court erred in dismissing the complaint herein.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

(Service acknowledged)

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Filed June 14, 1932.

Upon the motion of the plaintiff appearing by his attorneys, Messrs. Hawley & Worthwine, **IT IS ORDERED** that the appeal of the plaintiff above named be allowed as prayed for by the plaintiff in said cause, and it is further ordered that the amount of the bond be

fixed in the sum of \$500.00 as security for defendant's costs on appeal and it is so ordered.

It is further ordered that a transcript of the record be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 14th day of June, 1932.

CHARLES C. CAVANAH,

Judge.

(Service acknowledged)

(Title of Court and Cause.)

CITATION ON APPEAL

Filed June 14, 1932

THE PRESIDENT OF THE UNITED
STATES

TO THE UNITED STATES OF AMERICA,
AND H. E. RAY AND RALPH R. BRE-
SHEARS, ITS ATTORNEYS, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to appeal filed in the Clerk's office of the District Court of the United States, for the

District of Idaho, Southern Division, wherein Henry K. Personius is plaintiff and you are defendant, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS The Hon. Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 14th day of June, 1932.

CHARLES C. CAVANAH,

*United States District Judge
for District of Idaho, South-
Division.*

Attest:

W. D. McReynolds,

(Seal)

Clerk.

Service of the within Citation is hereby accepted this 14th day of June, 1932.

H. E. RAY,

District Attorney.

RALPH R. BRESHEARS,

Assistant District Attorney.

(Title of Court and Cause.)

UNDERTAKING ON APPEAL

Filed June 14, 1932

KNOW ALL MEN BY THESE PRESENTS,
That we, Henry K. Personius as principal, and THE

FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, as surety, are firmly held and bound unto the United States of America in the sum of Five Hundred (\$500.00) Dollars, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, our heirs, executors and assigns.

Whereas, the plaintiff in the above entitled cause has appealed to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, from the judgment rendered in the District Court of the United States for the District of Idaho, Southern Division, which judgment was made and entered on the 7th day of June, 1932, wherein and whereby Henry K. Personius was plaintiff and the United States of America was defendant.

Now, therefore, the condition of the above obligation is such that if the said Henry K. Personius shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

Dated this 14 day of June, 1932.

HENRY K. PERSONIUS,
Principal.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,
By CHAS. W. MACK,

(Seal)

Attorney-in-Fact.

Surety.

Countersigned by

CHAS. W. MACK,

Resident Agent, Boise, Idaho.

The foregoing bond is hereby approved this 14th day of June, 1932.

CHARLES C. CAVANAH,

Judge.

(Service acknowledged)

(Title of Court and Cause.)

PRAECIPE FOR APPEAL

Filed June 14, 1932

TO THE CLERK OF THE DISTRICT COURT
OF THE UNITED STATES, FOR THE DIS-
TRICT OF IDAHO:

Sir:

You will kindly prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a properly authenticated record of appeal in the above entitled cause, including therein the following documents:

- (a) Complaint.
- (b) Demurrer.
- (c) Minutes of the court.
- (d) Declination to plead further.

- (e) Judgment of dismissal.
- (f) Bill of exceptions.
- (g) Petition for appeal.
- (h) Assignments of error.
- (i) Order allowing appeal.
- (j) Citation.
- (k) Undertaking on appeal.
- (l) Praeceptum for appeal.
- (m) Any other file, paper or assignment required to be incorporated in the transcript herein under the practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

Service of the foregoing Praeceptum for Appeal is hereby acknowledged this 14 day of June, 1932.

H. E. RAY,
United States Attorney.
RALPH R. BRESHEARS,
Assistant U. S. Attorney.

(Title of Court and Cause.)

STIPULATION
Filed June 14, 1932

IT IS HEREBY STIPULATED By and between H. E. RAY, United States Attorney for the District of Idaho, and RALPH R. BRESHEARS, Assistant United States Attorney for the District of Idaho, attorneys of record for the appellee, and HAWLEY & WORTHWINE, attorneys of record for the appellant, that in printing the abstract of record in the above entitled cause that all titles of papers, acceptances of service and verifications may be omitted save and except that the complaint shall bear the title of said cause.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,

Residence: Boise, Idaho,

Attorneys for Plaintiff.

H. E. RAY,

United States Attorney,

RALPH H. BRESHEARS,

Assistant U. S. Attorney,

Attorneys for Defendant.

(Title of Court and Cause.)

CLERK'S CERTIFICATE

I. W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages num-

bered from 1 to 31 inclusive, to be full true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the Precipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$38.70 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 8th day of July, 1932.

W. D. McREYNOLDS,

Clerk.

(Seal)

